INDEX

	PAGE
Question Presented	1
Statement	2
Reasons for Denying Writ	4
1. Alleged Conflict with This Court's Order	4
2. "Public Policy"	6
3. "Appellate Fact Finding"	9
4. The Petition for Certiorari Is Premature	14
Appendix	20
Complaint in District Court	20
Motion for Summary Judgment in Lafferty Case	26

Table of Cases

American Constr. Co. v. Jacksonville, 148 U. S. 372, (1893)	15
Back v. Friden Calculating Co., Inc., 155 F.2d 361 (6 Cir., 1946)	12
Clackamas County, Ore. v. McKay, et al, 219 F.2d 479 (1954)	3
Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, v. Clackamas County	4
Hamilton Brown Shoe Co., v. Wolf Bros. & Co., 240 U. S. 251 (1915)	15
Hardt v. Heller Bros. Co., 171 F.2d 644 (3 Cir., 1948)	12
Home Indem. Co. of New York v. Standard Acc. Ins. Co. of Detroit, et al, 167 F.2d 919 (9 Cir., 1948)	12
House v. Mayo, 324 U. S. 45 (1945)	15
Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 (3 Cir., 1941)	12
Magnum v. Coty, 262 U. S. 159 (1922)	16
Marshall v. Baltimore & Ohio Railroad Co., 16 How. 314 (1853)	9

PAGE

Sun Insurance Office Limited of London v. Be-Mac Transport Co., 132 F.2d 535 (8 Cir., 1942) 12
Toledo Scale Co., v. Computing, 261 U. S. 399 (1923) 15
Trist v. Child, 21 Wall. 441 (1875) 8
U. S. v. Munsingwear, Inc., 340 U. S. 36 (1950) 5
United States v. United States Gypsum Co., 333 U.S. 364 (1948) 12, 13
United States v. Wholesale Oil Co., Inc., 154 F.2d 745 (10 Cir., 1946) 12
Valdes v. Larrinaga, 233 U. S. 705, 34 S. Ct. 750 (1914) 8

IN THE

Supreme Court of the United States

October Term, 1957

No. 429

BENTON COUNTY, OREGON, ET AL.,
Petitioners

v.

A. W. LAFFERTY, RICHARD L. MERRICK, and ROBERT B. ANDERSON, Secretary of the Treasury, ET AL.,
Respondents

BRIEF OF RESPONDENTS A. W. LAFFERTY AND RICHARD L. MERRICK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question to be decided is whether the Plaintiffs below, A. W. Lafferty and Richard L. Merrick, are entitled to compensation for their professional services out of a part of the fund, which has been withheld in the Treasury for this purpose, or whether upon the unsubstantial ground that an Act of Congress of June 24, 1954, which followed and implemented the decision of the Court of Appeals of April 30, 1954, intervened, the plaintiff lawyers are to be deprived of all compensation for their arduous labors on behalf of 18 Oregon counties, which resulted in substantial benefits to the counties.

STATEMENT

The facts set forth in the petition are deemed to be insufficient to apprise this Court fully of the situation.

By four Acts passed in 1866, 1868, 1869, and 1870 (14 Stat. 239; 15 Stat. 80; 16 Stat. 47; 16 Stat. 94), Congress granted more than 3,000,000 acres of land in Oregon to the Oregon and California Railroad Company. The granting acts required sales of the lands to actual settlers in tracts not greater than 160 acres and for prices not exceeding $2.50 per acre.

For failure by the railroad to obey those requirements, Congress, by the Act of June 9, 1916 (39 Stat. 318), revested the title to all unsold lands in the United States.

By the Act of August 28, 1937 (50 Stat. 874), the revested lands were directed to be administered by the Department of the Interior "for permanent forest production, and the timber to be sold, cut, and removed in conformity with the principle of sustained yield," 75 per cent of the revenues derived therefrom to be paid to the eighteen Oregon counties in which the lands are located, and 25 per cent to the Department of the Interior for administration purposes.

By Proclamations issued in 1892 and 1893, the President established two forest reserves (now called National Forests), and included therein 472,000 acres located within the boundaries of the grant to the railroad company.

As a result of a jusisdictional controversy between the Departments of Interior and Agriculture, an agreement was reached in 1942 to hold the money derived from timber sales in a Special Account in the Treasury Department until settlement of the jurisdictional dispute.

In 1952, Clackamas County, Oregon, brought an action in the United States District Court for the District of

Columbia on its behalf and on behalf of the other seventeen land grant counties, who are the Petitioners in the case at bar, to release the funds to the counties and to determine the jurisdictional dispute (*Clackamas County* v. *Douglas McKay, et al.**) That action resulted in the opinion of the United States Court of Appeals for the District of Columbia which is printed in Petitioners' Appendix C herein at pages 15a to 48a, and which is referred to herein as the *Clackamas County* case. Respondents Lafferty and Merrick were attorneys for Clackamas County in that litigation.

The object of Respondents Lafferty and Merrick in the case at bar is the recovery of compensation for their successful efforts in the Clackamas County ase, payable from funds held in the Treasury pending the outcome of this litigation (Joint (App. No. 11,844, *Clackamas County* case, page 3A et seq; No. 604, October Term, 1954, in this Court).

The Solicitor General of the United States summarized the controversy in the *Clackamas County* case in his petition for certiorari in No. 604, October Term, 1954, in this Court, as follows:

> The Oregon counties contended . . . that the lands in question should be considered "O & C" lands. In 1939, the Department of the Interior changed its earlier view and adopted the position of the Oregon counties. Hearings H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2d sessions (1943-1944), pp. 227-229. Because of the

* In this Brief in opposition to the petition for certiorari, the case entitled *A. W. Lafferty and Richard L. Merrick* v. *George M. Humphrey, Secretary of the Treasury, et al.; and Benton County, Oregon, et al.*, No. 2561-54 in the District Court; No. 13,353 in the Court of Appeals; and No. 429 in this Court, which is the case at bar, is, for convenience, referred to as the *Lafferty* case. The case of *Clackamas County, Oregon,* v. *McKay, Secretary of the Interior, et al.*, No. 5258-52 in the District Court; No. 11,844 in the Court of Appeals; and No. 604, October Term, 1954, in this Court, is similarly referred to as the *Clackamas County* case.

serious dispute which developed between the Department of Agriculture and the Department of the Interior as to which of the two statutes governed the distribution of the proceeds from timber sales from the lands, the suspense account involved in this litigation was established, Congress being advised of it. *Ibid.*, pp. 247-248, 387.[2] During the course of the controversy the Attorney General considered the matter over a period of many years in connection with some 15 bills introduced on the subject.

REASONS FOR DENYING WRIT

The Petitioners in their petition to this Court for a writ of certiorari give three reasons for the issuance of the writ.

In this brief in opposition to the petition each of these three reasons will be separately discussed.

1. *Alleged Conflict with This Court's Order.*

The first reason assigned by Petitoners for granting the writ of certiorari is:

> (1) The judgment of the Circuit Court of Appeals is in conflict with the order of this Court of April 18, 1955 (349 U.S. 909).

The order of this Court to which Petitioners refer is the Per Curiam order entered April 18, 1955, in the case of *Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, Petitioners* v. *Clackamas County, Oregon*, No. 604, which reads as follows:

---

[2] The full history of the controversy is set out in the legislative history of many bills on the subject. See, e.g., 2 Hearings, S. Committee on Public Lands and Surveys, S. 275, 78th Congress, 1st session (1943), (including reports by the Department of the Interior and Department of Agriculture (*ibid.*, pp. 119-178)); Hearings, H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2nd sessions (1943-1944).

> The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the proceeding upon the ground that the cause is moot.

The foregoing order of this Court was entered in response to a Petition for a Writ of Certiorari filed by Solicitor General Sobeloff which concludes with this paragraph:

> 4. Though this Court has made clear that anticipation of future difficulties does not preserve the [illegible] ticiable quality of a case which has been rendered moot (*Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362), to allay any apprehension which respondent may have, we suggest that the judgment of the court of appeals should be reversed or vacated and the case remanded for dismissal as moot without prejudice to the rights of the respondent in the future with respect to any actual issue which may possibly develop under the present law [Citing cases]. A grant of certiorari accompanied by a reversal or vacating of the judgment of the Court of Appeals and a remand of the cause to the district court with directions to vacate the order appealed from and to dismiss the proceeding as moot would be an appropriate disposition of the case [Citing cases].

It was unnecessary for this Court, in its order of April 18, 1955, to state that the case was to be dismissed "without prejudice to the rights of the respondent" because such was the well settled legal effect of its order.

In *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), cited by Petitioners, this Court held that in a case where the judgment was not vacated, the unvacated judgment operated as *res judicata*, but this Court pointed out that in a case where a judgment is *vacated for mootness*, the result is entirely different. This Court said:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate

the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U. S. 259, 267, 57 S. Ct. 202, 205, 81 L. Ed. 178, to be "the duty of the appellate court". That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

In the *Clackamas County* case, No. 604, this Court did not reverse the opinion of the Court of Appeals. It vacated the judgment of the court below on the ground of mootness and, in effect, decided only that the Statute of June 24, 1954, related to substantially the same subject matter considered by the Court of Appeals in its opinion of April 30, 1954, and that, therefore, there was no longer any actual controversy between the parties.

The very purpose of this procedure, as this Court pointed out in its opinion in the *Munsingwear* case is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."

If, under the procedure followed by this Court in the *Clackamas County* case, "the rights of all parties are preserved" and "none is prejudiced" *as between the parties to that litigation*, it must be true, *as between different parties to different litigation over different issues* that no "legal consequences" result from the prior litigation, and that there is no conflict between the litigation in the *Clackamas County* case and this case.

2. *"Public Policy"*

The second reason assigned by Petitioners for granting the writ of certiorari is:

"2. A federal court's award of attorney's fees out of public monies appropriated for a specific purpose, for

influencing the passage of favor legislation raises such grave questions of public policy as to call for review by this Court."

It is the obvious purpose of Petitioners to bring themselves under that portion of Rule 19(1)(b) of the Revised Rules of this Court which provides that one of the reasons for granting review on writ of certiorari which will be considered by the Court is "Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court; . . ."

Respondents submit that there is in this case no question as to the validity or construction of the Constitution or any law of the United States and that there is in the case no question of federal law, but, on the contrary, the question decided by the court of appeals was an ordinary common law question not within the criteria laid down by this Court for granting the writ of certiorari.

Under the caption (page 14 of Petitioners' petition), "The Award Offends Public Policy," Petitioners argue that the recovery of a fee by plaintiffs is so repugnant to public policy that it should be laid down, *as a matter of law*, that they cannot recover any compensation in any amount for the services which they admittedly rendered.

In order to perceive the full import of Petitioners' argument it is essential to keep in mind a few elemental facts in this case:

The *Clackamas County* case was a class action brought by Plaintiffs as attorneys in the name of Clackamas County for the benefit of all similarly circumstanced eighteen Oregon land grant counties. The action resulted in a decision of the United States Court of Appeals for the District of Columbia Circuit, which compelled the distribution to all eighteen counties of 75% of a fund in

the custody of the Secretary of the Treasury. *After* the rendition of this opinion of the Court of Appeals, the Congress enacted into statutory form the substance of the opinion of the Court of Appeals relating to the status of the land and distribution of the impounded funds. The only evidence that plaintiffs took any action whatsoever with reference to this statute is the statement in an affidavit filed by Lafferty, one of the Plaintiffs, that among other services rendered by him, he appeared before a committee of Congress. (See statement on page 16 of Petitioners' petition.) The Federal Regulation of Lobbying Act (2 U.S.C. Nos. 261-270), which regulates lobbying, expressly exempts appearances before committees of Congress from the operation of the Act. Section 267(a) states that the Act does "not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation."

In *Trist* v. *Child*, 21 Wall. 441, cited by Petitioners, a contract which contemplated certain lobbying activity, which this Court deemed improper, was held to be invalid. But this Court was careful to point out that an agreement for purely professional services would have been valid. The Court said:

> We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included: drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, *to a committee or other proper authority, and other services of like character.* (Emphasis supplied)

Thus does the Supreme Court draw a clear line between contracts for services which are valid and those which are void, *Valdes* v. *Larrinaga*, 233 U. S. 705, 34 S. Ct. 750.

The Petitioners also cite *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314. In *Marshall*, the Court was careful to make a distinction between improper actions such as it condemned and proper professional activity in connection with proposed legislation. The court said:

> All persons whose interests may in any way be affected by any public or private act of the Legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, *before legislative committees, as well as in courts of justice.* (Emphasis supplied)

In the case at bar, respondents are lawyers who were employed by Clackamas County, Oregon, to undertake important professional employment for the benefit of all the land grant counties of Oregon. This they carried out, with a high degree of skill, and with signal success. To say that there was anything improper, or against public policy, in their employment or in their conduct, is to make a gratuitous attack upon two members of the bar of this court, without a scintilla of evidence to support it.

3. *"Appellate Fact Finding"*

The third reason assigned by the Petitioners for granting the writ of certiorari is:

> (3) The factual determination on an appellate level of a causal connection between the *Clackamas* litigation and subsequent favor legislation so far departs from the accepted judicial standards as to call for an exercise of this Court's supervisory jurisdiction.

It is the obvious purpose of Petitioners to bring themselves under that portion of Rule 19(1)(b) of the Revised Rules of this Court which provides that one of the reasons for granting review on writ of certiorari which will be considered by this Court is

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial pro-

ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Respondents submit that there was in fact no departure from the usual course of judicial proceedings; that, on the contrary, the action of the Court of Appeals was in complete accord with the usually accepted course of the judicial process.

The Plaintiffs, Lafferty and Merrick, brought an action in the United States District Court for the District of Columbia against the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture and eighteen counties in the State of Oregon to recover compensation for legal services rendered to the counties.

The Secretary of the Treasury was joined only because he was the stakeholder of a fund belonging to the counties out of which Plaintiffs were to be paid if they recovered a judgment against the counties; the Secretary of the Interior and the Secretary of Agriculture were joined only that they might be enjoined from interfering with such payments. The three Secretaries had no interest in and took no position as to the merits of the controversy between Plaintiffs and the counties, as was plainly stated by the trial judge in his final order wherein he said:

> . . . . and it appearing to the Court that defendants, George M. Humphrey, Secretary of the Treasury; Douglas McKay, Secretary of the Interior; and Ezra Taft Benson, Secretary of Agriculture, take no position on the merits between the plaintiffs and the seventeen counties heretofore named . . .

Thus, the action brought by Plaintiffs, was in essence a suit by lawyers against the counties to recover fees for services rendered, and nothing more.

The final order of the trial judge denied plaintiffs' motion for summary judgment, granted the motion of the seventeen counties for summary judgment, and ordered that judgment be entered in favor of the defendants and against the Plaintiffs.

The case was submitted to the trial judge wholly on written documents, consisting of the pleadings and two affidavits of the Plaintiffs and other affidavits filed by Plaintiffs in support of their position. No witnesses were produced by any party and no oral testimony was taken. In the District Court, the Respondents moved for summary judgment "on the ground that all genuine material issues of fact are matters of judicial notice."

The facts before the trial judge were not in dispute. As he stated in his Memorandum:

> . . . all parties agree that there is no genuine issue of material fact . . .

With all the primary facts in the case agreed upon, the question before the trial judge became one of ultimate inference as to whether, on the basis of the undisputed facts, the Plaintiffs could recover a fee in some amount. The order of the trial judge to enter judgment in favor of the defendants and against the Plaintiffs was in effect a decision that, *as a matter of law,* the Plaintiffs could not recover any fee in any amount for the substantial legal services which, as a matter of admitted fact, they had rendered.

There had been no witnesses in the trial court whose candor and credibility the trial judge had had opportunity to observe. The pertinent documents which had been before the trial court were also before the Court of Appeals. The Court of Appeals was in as good a position as the trial court to draw a proper inference from these documents. The Court of Appeals, consisting of three judges, unanimously decided that the trial judge had

drawn an erroneous inference from the documents and reversed his judgment and remanded the case for further proceedings not inconsistent with the appellate court's opinion.

There is in this case no ground for granting the writ of certiorari on the basis of the importance of the question involved. The question as to whether lawyers are to recover a fee for legal services rendered and the amount of such fee is admittedly an ordinary common law question, far removed from a federal question involving the construction of the federal Constitution or a federal law. The issue presented for decision in this case is in the category of run-of-the-mill litigation essentially local in character. This Court would not be justified in taking jurisdiction on certiorari unless there is presented some procedural question of great importance.

There is in this case no procedural question of importance. The action of the court of appeals in reviewing and passing upon the ultimate legal inference drawn by the trial court from an undisputed state of facts was only an example of the usual and customary exercise of the appellate jurisdiction of the courts of appeal. It is in no respect a departure from the accepted and usual course of judicial proceedings, as is shown by many reported cases. *Sun Insurance Office Limited of London* v. *Be-Mac Transport Co.*, 132 F.2d 535; *United States* v. *Wholesale Oil Co., Inc.*, 154 F.2d 745; *Back* v. *Friden Calculating Co., Inc.*, 155 F.2d 361; *Home Indemnity Co. of New York* v. *Standard Acc. Ins. Co. of Detroit, et al.*, 167 F.2d 919; *Hardt* v. *Heller Bros. Co.*, 171 F.2d 704; *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F.2d 704; *United States* v. *United States Gypsum Co.*, 333 U. S. 364.

In *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (1941), the plaintiff, an attorney, sued the defendant for the recovery of compensation for professional services. The case was tried to the court without a

jury. The question involved on appeal was whether the trial court erred in the amount at which it fixed the plaintiff's compensation. The Circuit Court of Appeals, Third Circuit, said:

> The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law prior to the promulgation of the Rules of Civil Procedure. Brown v. United States, 3 Cir., 95 F.2d 487, 490; Dunn v. Trefry, 1 Cir., 260 F. 147, 148. The new Rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular.

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), this Court had before it a factual situation similar, on the question here involved, to the factual situation in the case at bar.

In explanation of its action in overturning the finding of the trial court and substituting its own opposite conclusion, this Court (pages 394 and 395) said:

> In so far as this finding [Finding 118] and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice [Citing cases]. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies [Citing cases] or by a jury, [Citing cases] this Court may reverse findings of fact by a

> trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however [Citing cases]. *A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* (Emphasis supplied)

This case is a stronger case in support of the proper power of the appellate court to review and pass upon the action of the trial court than the *Gypsum* case because in the *Gypsum* case the trial court had the opportunity to observe and appraise the candor and credibility of the witnesses, which opportunity was necessarily denied to this Court, because in this case there were no witnesses and no oral testimony.

The action of the Court of Appeals in this case is in conformity with the prevailing practice in courts of appeal in other circuits, and is approved by the rule laid down in *Gypsum* by this Court.

4. *The Petition for Certiorari is premature, because there has been no final judgment in this case.*

The Court of Appeals remanded this case to the District Court to hear evidence on the extent and value of the services of the Respondent lawyers. There has been no final judgment in the court below. The Petitioners seek a writ of certiorari to review the interlocutory action of the Court of Appeals. The power of the court to review interlocutory judgments is to be exercised only in "extraordinary cases," and the fact that the judgment sought to be reviewed is not final may, of itself, furnish sufficient ground for the denial of the application. The writ does not issue to review an interlocutory judgment of the Circuit Court of Appeals "unless it is necessary to

prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville,* 148 U. S. 372 (1893).

In *Hamilton-Brown Shoe Co.* v. *Wolf,* 240 U. S. 251 (1915), the plaintiff's bill for trade mark infringement was dismissed by the trial court. The court of appeals reversed and remanded for an accounting. The Supreme Court denied certiorari. After final judgment, the Supreme Court granted certiorari, and in its decision, referring to writs of certiorari, this court said:

> As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [Citing cases] And, except in extraordinary cases, the writ is not issued until final decree [Citing cases]. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; . . ."

The case at bar is a lawsuit brought by two lawyers to recover a fee for services which they admittedly rendered, an action which is in no sense "special and important." This case, *at this stage certainly,* should not occupy the time, the thought, and the attention of the highest court in the land.

A mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit the court's power to review the whole case when it is brought here by certiorari on final judgment, *Toledo Scale Co.* v. *Computing,* 261 U. S. 399 (1923). The interlocutory action becomes merged into the final judgment and is open to review by certiorari, *Hamilton Brown* v. *Wolf, supra.* In such a case, the first denial of the writ of certiorari imports no expression of opinion upon the merits of the case, *House* v. *Mayo,* 324 U. S. 45 (1945).

As said by Mr. Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159 (1922), the writ of certiorari is designed "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. This jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."*

It is a fair assumption that in the event of an adverse final judgment in the courts below, the petitioners will be here again with a second petition for certiorari.

This case involves no federal question and no conflict between the Courts of Appeal. Surely the courts below are competent to decide all that is involved in this case, viz: (1) whether two lawyers are entitled to a fee for their services, and (2) if so, to fix the amount. If there is to be a review on certiorari in this Court, it should be after final judgment.

Reply to Memorandum of the Respondent Government Officials

In the Memorandum filed in this case by the Solicitor General on behalf of the Respondent Government officials, it is said that a question is raised in this Court as to

---

* The report of the Senate Judiciary Committee, recommending the passage of the Act of February 13, 1925 (43 Stat. 936), said: "The central thought is this, that litigants have, first, a trial in the district court, and then by appeal or writ of error, a trial in the Circuit Court of Appeals—a court that ranks as high or higher than the supreme tribunals of the states. It is our belief that here ordinary litigation should end, and that the cases should not go to the Supreme Court of the United States unless the questions involved are of grave public concern, or unless serious uncertainty attends the decision of the Circuit Court of Appeals by reason of conflict in the rulings in these courts or the courts of the states." Quoted in *Stamey* v. *United States*, 37 F.2d 188.

whether the District Court had jurisdiction over the counties, and it is stated that although the question "was raised in the Court of Appeals, the opinion is silent on the subject."

The Court of Appeals in its opinion is silent on the subject because no such issue was before it. The Government had frankly admitted that the seventeen defendant counties made a general appearance in the District Court and that there had been "a waiver and abandonment of the jurisdictional defense" by them.

In the "Memorandum for George M. Humphrey, Secretary of the Treasury, Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, Petitioners" filed in this case (No. 13,353) in the United States Court of Appeals for the District of Columbia Circuit by Assistant Attorney General Perry W. Morton and Roger P. Marquis and Harold S. Harrison, Attorneys in the Department of Justice, under the caption "Statement of Position," it is stated:

> 1. On the merits of this dispute the appellee government officials are neutral. They neither affirm nor deny that the appellants are entitled to an attorneys' fee payable out of the fund now in the Treasury. It is conceded that approximately $600,000 of the amount retained in the special fund is due and owing to the appellee Oregon counties and to Clackamas County. This fund has been retained only because of this litigation. In these circumstances, if this Court finds that a valid lien for attorneys' fees exists; that all parties will be bound by the decree; and that it will be "a full acquittance to the United States for any and all claims and demands of the parties arising out of or connected with said claim". (*Houston v. Ormes*, 252 U.S. 469, 472 (1920); *Mellon v. Orinoco Iron Co.*, 266 U.S. 121, 125-127 (1924)), appellee government officials will not be prejudiced by a decree directing such payment.

2. It is believed that a jurisdictional matter should be invited to the attention of the Court. As spelled out in *Houston* v. *Ormes*, 252 U.S. 469, 472 (1920), before a mandatory order could be entered directing the named government officials to pay a part of the fund to the plaintiffs, the United States would have to have a proper acquittance against the counties. In other words, before the relief demanded in the appellants' complaint could be granted it must be found that the court has jurisdiction over the appellee counties. Absent such a finding, no relief can be granted against the remaining defendants. *Pilger* v. *Sutherland*, 61 App. D. C. 84, 87, 57 F.2d 604, 607 (1932), quoted with approval in *Morgenthau* v. *Fidelity and Deposit Co. of Maryland*, 68 App. D.C. 163, 165, 94 F. 2d 632, 634 (1937).

In the answer filed on behalf of the appellee officials this issue was raised in order to obtain a specific adjudication that service either was or was not properly effected on the nonresident counties (Jt. App. 12). The seventeen counties answered, raising as their first defense a jurisdictional claim (Jt. App. 7). Subsequent to that time, however, they filed a motion for summary judgment in which they sought an adjudication solely on the merits (Jt. App. 14). In addition, they did not raise the jurisdictional issue in their opposition to appellants' cross motion for summary judgment in the court below. *This procedure we take to be a general appearance and a waiver or abandonment of the jurisdictional defense.* (Emphasis supplied) in these circumstances, any question of the court's jurisdiction may now be out of the case so that the only issues relate to the merits. However, as previously noted, it would require a conclusion that there is jurisdiction over all of the defendants before relief in the nature of mandamus could be granted.

The foregoing statement made by the Government lawyers in the previous Memorandum which they filed in the Court of Appeals is a complete refutation of the Memorandum which they have just filed in this Court. There

is in the case no question as to the jurisdiction of the District Court over the seventeen defendant counties.

Respectfully submitted,

JAMES P. KEM
1625 K Street, N. W.
Washington 6, D. C.
Attorney for Respondents Lafferty and Merrick

BYRON N. SCOTT
Wyatt Building
Washington 5, D. C.

MONTE APPEL
1625 K Street, N. W.
Washington 6, D. C.

DONALD C. WALKER
911 Portland Trust Building
Portland 4, Oregon
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 2561-'54

1 [Filed June 15, 1954]

A. W. LAFFERTY, Fenton Building, Portland 4, Oregon, and RICHARD L. MERRICK, 1624 Eye St., N. W., Washington 6, D. C., PLAINTIFFS

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, Washington, D. C., DOUGLAS McKAY, Secretary of the Interior, Washington, D. C., EZRA TAFT BENSON, Secretary of Agriculture, Washington, D. C., BENTON COUNTY, Corvallis, Oregon, CLACKAMAS COUNTY, Oregon City, Oregon; COLUMBIA COUNTY, St. Helens, Oregon, Coos COUNTY, Coquille, Oregon, CURRY COUNTY, Gold Beach, Oregon, DOUGLAS COUNTY, Roseburg, Oregon, JACKSON COUNTY, Jacksonville, Oregon, JOSEPHINE COUNTY, Grants Pass, Oregon, KLAMATH COUNTY, Klamath Falls, Oregon, LANE COUNTY, Eugene, Oregon, LINCOLN COUNTY, Toledo, Oregon, LINN COUNTY, Albany, Oregon, MARION COUNTY, Salem, Oregon, MULTNOMAH
2 COUNTY, Portland, Oregon, POLK COUNTY, Dallas, Oregon, TILLAMOOK COUNTY, Tillamook, Oregon, WASHINGTON COUNTY, Hillsboro, Oregon, and YAMHILL COUNTY, McMinnville, Oregon, DEFENDANTS

COMPLAINT

(Action for Attorney Fees, Etc.)

1. Jurisdiction is based on diversity of citizenship, the amount in controversy, which exceeds three thousand dollars, exclusive of interest and costs, and other grounds as shown hereinafter.

2. Plaintiff, A. W. Lafferty, is a resident of the City of Portland, State of Oregon, is a duly admitted attorney at law, and is engaged in the general practice of law in the State of Oregon.

Plaintiff, Richard L. Merrick, is a resident of the State of Maryland, is a duly admitted attorney at law, and is engaged in the general practice of law in the City of Washington, District of Columbia.

3. Defendant, George M. Humphrey, is Secretary of the Treasury of the United States, and a non-resident of the State of Oregon.

Defendant, Douglas McKay, is Secretary of the Interior of the United States, and at present is a non-resident of the State of Oregon.

Defendant, Ezra Taft Benson, is Secretary of Agriculture, of the United States, and a non-resident of the State of Oregon.

Said three defendants are stakeholders or custodians of funds belonging to the other defendants named herein, as hereinafter more fully shown.

Benton County, Clackamas County, Columbia County, Coos County, Curry County, Douglas County, Jackson County, Josephine County, Klamath County, Lane County, Lincoln County, Linn County, Marion County, Multnomah County, Polk County, Tillamook County, Washington County, and Yamhill County are all separate political subdivisions of the State of Oregon, and are the owners of 75 per cent of the fund held in escrow, as hereinafter more fully shown.

4. The eighteen Oregon Counties herein named as defendants are justly indebted unto the plaintiffs for legal services performed and rendered for their benefit, in the sum of $600,000.00, payable out of the fund belonging to them now held in escrow by the defendants, George M.

Humphrey, Douglas McKay, and Ezra Taft Benson, as hereinafter more fully shown.

5. Heretofore, on May 26, 1952, plaintiff A. W. Lafferty, in association with the District Attorney of Clackamas County, Oregon, brought an action in the United States District Court for the District of Oregon, wherein Clackamas County, one of the defendants herein, was named as plaintiff, and the then Secretary of the Interior and the then Secretary of Agriculture were named as defendants, seeking distribution of funds held in escrow in the United States Treasury in a special deposit account described as "Deposit Fund Account 12X6875.110, Suspense Agriculture (Forest Service)", which action was dismissed because of improper venue on or about November 19, 1952, whereupon on November 20, 1952, the same action was brought by plaintiff Richard L. Merrick, as attorney for said Clackamas County, in the United States District Court for the District of Columbia, said Clackamas County then and there suing on its own behalf and for the benefit of itself and the other seventeen so-called Oregon and California land grant counties of Oregon, named as defendants herein, said action being brought against the same defendants as those involved in the original action brought in Oregon; namely, the Secretary of the Interior and the Secretary of Agriculture, seeking the same relief as originally prayed for by said Clackamas County. A motion to dismiss said action was sustained by the United States District Court for the District of Columbia on May 20, 1953, on the ground of lack of jurisdiction, and on that date an appeal on behalf of said Clackamas County to the United States Court of Appeals for the District of Columbia Circuit was taken and thereafter vigorously prosecuted and carried to a conclusion, and thereafter said United States Court of Appeals for the District of Columbia Circuit, in a decision dated April 30, 1954, granted to said Clackamas County all the relief prayed for in its complaint.

and specifically directed the United States District Court for the District of Columbia to enter a judgment enjoining the Secretary of Agriculture from interfering with compliance by any other Government official with the terms of the Acts of Congress of June 9, 1916 (39 Stat. 218) and August 28, 1937 (50 Stat. 874), and particularly from interfering with the distribution of the moneys referred to above held in the escrow account aforesaid, and from interfering with the treatment of the lands in Oregon from which the moneys were derived as "land revested from the railroad by the 1916 Act of Congress"; and directing the Secretary of the Interior to issue authorization to the Treasurer of the United States to distribute the said moneys in said escrow account in accordance with the provisions of said Acts of Congress of 1916 and 1937, which provide in effect that 75 per cent of said funds shall go to the eighteen Oregon Counties named as defendants herein, and 25 per cent to the Department of the Interior for administration purposes. The said moneys now held in escrow in said account, as aforesaid, aggregate $8,000,000.00, of which $6,000,000.00 are distributable to the eighteen Oregon Counties named as defendants herein under the terms of said Acts of Congress of 1916 and 1937, and the decision of the said United States Court of Appeals for the District of Columbia Circuit.

6. In and about the filing and conduct of said legal actions, as aforesaid, and the prosecution of said appeal to the United States Court of Appeals for the District of Columbia Circuit, as aforesaid, the plaintiffs herein rendered extensive and valuable legal services for the benefit and advantage and on behalf of said eighteen Oregon Counties, of the reasonable value of ten per cent of $6,000,000.00, the amount distributable to said Oregon Counties, by reason whereof the said eighteen Oregon Counties named as defendants herein are justly indebted

unto plaintiffs in the said sum of $600,000.00.

7. After the rendition of the decision of the United States Court of Appeals for the District of Columbia Circuit on April 30, 1954, as aforesaid, the Congress, by reason of the activities of certain members of the Oregon delegation in Congress, which activities plaintiffs believe were and are designed and intended to supersede the judgment and determination of said United States Court of Appeals for the District of Columbia, and to prevent plaintiffs from collecting their just fees and compensation for their services, as aforesaid, passed an Act in the Senate on May 20, 1954, and in the House of Representatives on June 9, 1954, providing, among other things, for the payment of the funds impounded in said escrow account, as aforesaid, to the eighteen Oregon Counties named as defendants herein in the same manner and amounts as directed in the decision of said United States Court of Appeals for the District of Columbia Circuit, which said Act is about to be approved by the President, and said defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson, are about to pay or cause to be paid out said funds to said counties ostensibly under the provisions of said Act of Congress and not under the decision of the said United States Court of Appeals for the District of Columbia Circuit, and thereby and in that manner to supersede and nullify the decision of said Court of Appeals, and to render collection by plaintiffs of just compensation for their services, as aforesaid, extremely difficult or impossible.

WHEREFORE, plaintiffs pray:

1. For judgment against the said defendants and each and all of them for the sum of $600,000.00, besides costs.

2. That the defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson be directed to deposit or cause to be deposited in the registry of this Court

sum of $600,000.00 from the funds in said escrow account, to abide the judgment of this Court herein.

3. Or, in the alternative, that said defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson, their agents, servants and attorneys, be restrained and enjoined from paying to the defendants, the eighteen Oregon counties named herein, the sum of $600,000.00 pending the judgment of this Court herein.

6 4. That service on the non-resident defendants, the eighteen Oregon Counties, be made by publication or by substituted process having the same effect as publication, or in such other manner as this Court may direct.

5. For such other, further or different relief as to the Court may seem just and proper or the nature of the case may require.

/S/ A. W. LAFFERTY,
Fenton Building,
Portland 4, Oregon,

/S/ RICHARD L. MERRICK,
1624 Eye St., N. W.
Washington 6, D. C.
Plaintiffs pro se.

DISTRICT OF COLUMBIA, ss:

Richard L. Merrick, being first duly sworn according to law on oath deposes and says that he is one of the plaintiffs in this action; that he has read the foregoing complaint by him subscribed and knows the contents thereof, and that he verily believes the same to be true.

//S/ RICHARD L. MERRICK

Subscribed and sworn to before me this 15th day of June, 1954

/S/ MARIANNA D. WAGGAMAN
Notary Public, D. C.

(Caption Omitted)

19 [Filed Dec. 21, 1955]

MOTION FOR SUMMARY JUDGMENT

Come now Benton County, Columbia County, Coos County, Curry County, Douglas County, Jackson County, Josephine County, Klamath County, Lane County, Lincoln County, Lynn County, Marion County, Multnomah County, Polk County, Tillamook County, Washington County and Yamhill County, all of the State of Oregon, by their attorneys, and move the Court, pursuant to Rule 56 F. R. C. P., for summary judgment, and for reason therefor say that all genuine, material issues of fact are matters of judicial notice about which there can be no dispute and that defendants should have judgment, since the plaintiffs' efforts were unsuccessful in bringing about distribution of the fund which their litigation contemplated and since plaintiffs were not retained by these movants, all as more fully appears in the attached Memorandum of Points and Authorities.

HOGAN & HARTSON

By Paul R. Connolly /s/
810 Colorado Building
Washington 5, D. C.
Frank S. Sever /s/
510 Corbett Building
Portland, Oregon
Attorneys for the Oregon County Defendants, except Clackamas County, Oregon.

20 (CERTIFICATE OF SERVICE)